Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1178

FAYMOR DEVELOPMENT CO., INC., a Corporation and as General Partner of Tenhill-Faymor Housing Associates, a Partnership,

Petitioner,

EVELYN M. KING, Individually and as President of the Staten Island Branch of the National Association for the Advancement of Colored People, DONALD ASINOBI, Individually and as Treasurer of the Clifton Home Owners Association, CYNTHIA MAILMAN, Individually and as Representative of the Stapleton Civic Association, Inc., LOUIS P. WEIN, Individually and as Chairman of the Clifton Homeowners Association, AMELIA HALL, Individually and as Representative of the Clifton Homeowners Association, HELEN R. POSE, Individually and as President of the Stapleton Civic Association, Inc.,

Respondents.

BRIEF IN OPPOSITION TO GRANTING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN G. HALL
JOHN S. WELLEKENS
HALL & THOMPSON
57 Beach Street
Staten Island, New York 10304
Attorneys for Respondents

Dated: February 29, 1980.

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IN THE

SUPREME COURT OF THE UNITED STATES

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FAYMOR DEVELOPMENT CO. INC., ET. AL.,

Petitioner,

-against-

EVELYN M. KING, ET. AL.,

Respondents.

BRIEF IN OPPOSITION TO GRANTING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents Evelyn M. King, et. al, appellees below, pray that the Petition dated January 31, 1980 of Petitioner for a Writ of

Certiorari to the United States Court of Appeals for the Second Circuit to review the judgment of the Second Circuit entered November 2, 1979, be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, review of which is sought, is not officially reported, and is reproduced as Appendix "A" to the Petition (PA-39a).[1]

The opinion of the District Court for the Eastern District of New York is reported at 464 F. Supp. 827 (PA-1a).

JURISDICTION

The judgment of the United States

1. Hereafter, references such as PA-39a, etc. refer to the Appendixes annexed to the Petition.

Court of Appeals for the Second Circuit was entered on November 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Did the Court of Appeals (and the District Court) clearly err in finding: a) That the almost exclusive use of Census Tract Boundaries and Census Data and the reliance solely thereon by the defendant United States Department of Housing and Urban Development ("HUD") in the application of HUD Site and Neighborhood Standards was arbitrary and capricious?, b) that the relevant community was at the tipping point and that Tenhill's Terrace Gardens project would tip that community.

2. Did the Court of Appeals (and the District Court) clearly err in not remanding the Terrace Gardens proposal to HUD for further consideration and, instead, granting a permanent injundtion which enjoined HUD from providing or reserving federal funds for the construction of a low-income housing project at that site by Tenhill.

STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 5, Section 706 (Administrative Procedure Act Sect. 706) (PA-42a);

2. United States Code, Title 42, Sections 1437 and 1437 (f), (Housing and Community Development Act of 1974, Sect. 8 Housing Assistance Payments Program) (PA-43a);

3. United States Code, Title 42, Section

3601 (d)(5) (Fair Housing Act of 1968) (RA-5a);[2]

4. United States Code, Title 42, Sections 4332 (2)((c) and 4332 (2)(D) (National Environmental Policy Act of 1969) (RA-1a);

5. United States Code, Title 42, Section 5301 (Housing and Community Development Act of 1974) (RA-3a);

6. 24 Code of Federal Regulations, Section 880.112 (HUD Site and Neighborhood Standards) (PA-50a).

STATEMENT OF THE CASE

In or about 1975, Petitioner submitted a preliminary proposal to HUD for the development of a six story multi family apartment house to be known as Terrace Gardens Housing for

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2. Hereafter, references such as RA-5a, etc., refer to the Appendix annexed to the Respondents' Brief.

the Elderly, to be located at the southwest corner of Tompkins and Hill Street, Staten Island, New York. The proposal was submitted under the Section 8 Housing Assistance Payments Program, Section 8 of the Housing and Community Development Act of 1974, 42 U.S.C. 1437 (f). Pursuant to the HUD procedure, the proposal was referred to the various HUD technical branches, which at that time included the Equal Opportunity Division ("EO") and Housing Management Division ("HM"), for review.

The EO division found the site to be "Not Approvable" in that it did not "meet the site and neighborhood standards of

Section 880.112 (b)(c)(d)."[3] The HM division determined that "the proposed location of the project would adversely affect other subsidized housing" in the area.[4]

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3. The HUD Site and Neighborhood Standards Section 880.112 (b) (c) (d) in 1975 were identical to the Site and Neighborhood Standards, which were applicable to the instant proposal, set forth at PA-50a.
4. Subsequent to these negative recommendations, Faymor appealed their findings and a joint EO-HM field trip to the site was made. Their field trip report indicated that a) the 1970 census which revealed a 12.8 percent minority population in the census tract containing the proposed site "might be changing to a higher percentage of minorities;" b) that there was already more than an "ample allotment of publicly-assisted housing for their neighborhood;" c) that approval of this site would "cause an increase of an undue concentration of assisted units" in the neighborhood, "Staten Island is suburban enough to avoid such concentration." d) the state project (New York City Housing Authority 693 Unit Project) was "approximately 50% minority" with a "turnover...close to 20% annually" and this "turnover is increasing."

The project was not approved by HUD.

In response to a HUD Notification of Fund Availability for 1,000 family dwelling units of new construction under the Section 8 Housing Assistance Payments Program, to be located in the City of New York, Tenhill on or about June 22, 1977 submitted a preliminary proposal for the development of a six-story, ninety-six unit low income housing project at the same site for which the prior proposal had been found "not approvable."

This proposal was again referred to the various HUD technical branches which at that time included the Equal Opportunity Division and the Economic

e) "the area was deteriorating and perhaps a little dangerous for the elderly."

and Market Analysis Division ("EMAD") among others.

The EO division again had the duty to determine if the proposed site met those portions of the Site and Neighborhood Standards which were concerned with the minority concentration of the area surrounding the proposed site.[5] The EO specialist's review consisted solely of checking the 1970 census data for the census tract in which the proposed site was located, determining that the said tract had a total of 4,623 persons, including 4,000 white persons and 623 minority persons, with a minority population of 12.8 percent, and recommending approval of the proposal. His one page, form report,

5. 24 C.F.R. 880.112 (b) (c)

contained no reference to the prior EO reports for this site.

The EMAD division, recently established, now had the duty to determine if the proposed site met the Site and Neighborhood Standard which required that the site "promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons."[6] The EMAD specialist determined that the 1970 census was outdated and that the site did not meet the aforesaid standard and recommended its disapproval.[7]

6. 24 C.F.R. 880.112 (d)

7. The EMAD report stated in pertinent part: "Subject site is in a Census Tract impacted with subsidized housing (Section 221 (d) BMIR and Section 236) and Stapleton Houses (700 units of state aided low income housing). Data from 1970 Census is not reflective of current conditions."

The EMAD report, however, was somehow misplaced and not considered in the HUD review of the Tenhill proposal.[8]

Tenhill's preliminary proposal was approved by HUD on or about August 10, 1977 and Tenhill thereafter submitted a final proposal which was approved by HUD, which agreed to provide financial assistance in two forms: a) federal insurance of a privately financed building loan and first mortgage of $4,369,100 for construction of Terrace Gardens; and b) payments to Tenhill for rental assistance

8. The HUD acting area director who testified at the trial could not recall how the EMAD report was misplaced or how she approved the proposal without that portion of the total processing check list, although HUD failed to produce the official directly responsible for the reviewing the various divisional reports, who was still with HUD.

for units occupied by eligible Section 8 residents, for which HUD reserved $749,112.00 per annum.

On September 6, 1978, prior to the closing of the mortgage commitment and commencement of construction, respondents filed a complaint in the United States District Court for the Eastern District of New York for a preliminary and permanent injunction to enjoin HUD from providing any federal funds or insurance to Tenhill for the aforesaid proposed project.

Respondents moved by order to show cause for a preliminary injunction. On the return date, HUD advised the Court and counsel of the existence of the misplaced EMAD report and requested that the Tenhill proposal be remanded to HUD for further consideration in

light of said report. Upon further consideration by HUD, the EMAD report was overruled and the original approval of the Tenhill proposal was sustained by the acting area director who approved the site originally.[9]

An evidentiary hearing on respondent's application for a preliminary injunction was held before the District Court, but following the commencement of Tenhill's case, the District

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9. The HUD Deputy Area Manager's report to the Court states in pertinent part: "The Census Tract in which the project is located had a reported median income ($8,987) in the 1970 Census more than $600 above 80% of the new SMSA median, and thus could not be established as a low income concentrated area." and overruled the EMAD negative review of the proposal. HUD used the same 1970 census figures found by EMAD to be outdated to overrule the EMAD report!

Court directed that the evidentiary hearing be deemed consolidated with the trial of respondent's complaint for a permanent injunction, said consolidation not having been objected to by any of the parties to the action.

The District Court held that HUD had acted arbitrarily and capriciously in approving the Tenhill proposal, that the surrounding community was in danger of tipping and that the proposed project would "tip" the community into a non-white, low-income ghetto, and permanently enjoined HUD "from providing or reserving federal funds for the construction of a low-income housing project at the proposed site. "464 F. Supp. at 845; (PA-35a).[10]

10 The District Court in its opinion also noted: "Plaintiff's post-trial memorandum raises a

Tenhill and HUD appealed to the United States Court of Appeals for the Second Circuit, but HUD subsequently withdrew its appeal. The Circuit Court affirmed "...substantially on the opinion...below."[11]

violation of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq. as another basis for enjoining HUD's approval of Tenhill. The Court finds that the location of Tenhill in an area with a high concentration of low-income housing supports plaintiff's contentions. See Karlen v. Harris, supra. Since this court has found numerous other basis for enjoining HUD's action, an extended discussion of this basis for issuing an injunction is unnecessary." 464 F. Supp. at 844 (PA-34a).

11. The Court of Appeals released its decision on November 2, 1979, the day following argument, apparently realizing that "the area's black and white community stands ready to abandon the area if Tenhill is built" and that the community needed immediate reassurance that their neighborhood was not going to become a ghetto.

REASONS FOR DENYING THE WRIT

1. The finding that HUD's reliance on census tract boundaries in vacuo in order to delineate a relevant area of minority or low-income concentration and HUD's reliance solely on the census data for said tract was arbitrary and capricious and in violation of HUD's statutory duty to integrate does not present an important question for this Court to review.

While HUD has the responsibility for administering the federal programs in a manner which will further the national policy on housing, HUD also has the concomitant "affirmative duty to promote racial integration through its housing policy."[12] Shannon v.

12. 464 F. Supp. at 837(PA 17a)

HUD, 436 F. 2d 809 (3rd Cir. 1970), Otero v. New York City Housing Auth., 484 F. 2d 1122 (2d Cir. 1973); Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044 (S.D.N.Y. 1974), aff'd as to tipping, 523 F. 2d 88 (2d Cir. 1975).[13]

Congress set forth its mandate that HUD take affirmative action to promote fair, decent and "open, integrated residential housing patterns" in the Housing and Community Development Act of 1974, 42 U.S.C. 1437 (f), the Fair Housing Act of 1968, 42 U.S. C. 3601 et seq., the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq., the Housing and Community Development Act

13. Accord, Banks v. Perk, 341 F.Supp. 1175 (N.D. Ohio 1972) aff'd in part, 473 F. 2d 910 (6th Cir. 1973) Blackshear Residents Organization v. Housing Authority of City of Austin 374 F. Supp. 1138 (W.D. Tex.1971)

of 1974, 42 U.S.C. 5301, et seq.

In order to implement its housing programs, HUD, spurred on by Court action, adopted Site and Neighborhood Standards to govern the process of selecting the best possible sites for housing projects to be funded.[14] These standards were intended to avoid the concentration of minority and low-income families in areas of high minority or low-income concentration.

As developed in the trial before the District Court below, HUD has also adopted policies not set forth in its published regulations, in this case, the policy that, only the

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14 24 C.F.R. 880.112 (PA-50a). For history see HUD's Statement of Policy in Notice of Proposed Rule Making, 24 C.F.R. 200. 704,880.112, in 42 Fed. Reg. 4269-4299 (Jan. 24, 1977).

neighborhood or community which lies within the same census tract boundaries as the site of the proposed project will be affected by the proposed project and that only the last census statistics are applicable to a determination of minority or low-income concentration.[15]

In reviewing Tenhill's proposal, HUD followed its "policy" to the letter and checked the census book, determined the 1970 racial composition of the census tract and approved the proposal.[16] The District Court held that

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15. HUD relied principally upon its new proposed Site and Neighborhood Standards (42 Fed. Reg. No. 15) as an expression of HUD policy for the exclusive use of "census tracts", but as clearly indicated therein, even the proposed regulations are not so restrictive. 464 F. Supp. at 838 (PA-20a)

16. The HUD EO specialist testified that even had the "Park Hills/Fox Hills" low income projects of more than 4,000 tenants been located directly across the street from the proposed site but in a different census

where "such boundaries distort the racial composition of a neighborhood and lead to an undue concentration of minorities in a small area, they may not be relied upon by HUD in approving a low-income housing 'project", and that their use in this case was arbitrary and capricious. 464 F. Supp. at 840 (PA-25a). The size of an area to be considered in the evaluation of a site is a question of fact. Otero v. New York City Housing Authority 484 F. 2d at 1134. In Trinity Episcopal School Corp. v. Romney, supra, the District Court held under the facts of that case that the relevant community was a community planning district, 387 F. Supp. at 1066. As fully set forth in the District Court's opinion, respondents offered substantial

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tract, HUD would not have considered them because they would be in a different census tract.

and convincing evidence both as to the relevant community or area which would be affected by the proposed project and as to the actual conditions, i.e. the concentration of minority and low-income persons in the area.

Petitioner argues that "the holding of the lower courts, if permitted to stand as a guide in future cases, would place an intolerable burden upon HUD and upon developers." (P-6). Significantly, and as the Court of Appeals also noted (PA-40-41a), HUD did not find the holding of the lower courts to be so intolerable as to require an appeal.[17] The District Court noted its appreciation of "the difficulty HUD may encounter in its attempts

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17. HUD filed a notice of appeal from the Dist-Court's judgment just prior to the running of the statutory period, apparently to protect its right to appeal, but withdrew its appeal soon thereafter.

to compile relevant data" on minority and low-income concentration but correctly noted:

> "that burden is part of HUD's statutory duty....HUD must look beyond census statistics and arbitrary area boundaries in attempting to ascertain the existence of a neighborhood and the changes that have occurred there." 464 F. Supp. at 841 (PA-28a).
>
> "Thus, reliance on outdated census data as the primary indicator of racial and low-income concentration is arbitrary and capricious. Mere administrative convenience cannot justify the use of such data where the effect is to prolong and intensify an unhealthy situation." Id. at 841, (PA-27a).

The District Court, and by its affirmance, the Court of Appeals, did not hold that census tract boundaries and census data may not be considered by HUD in its evaluation of a site but only that:

> "imaginary census tract boundaries alone reflect neither a community's perception of itself nor the social cohesiveness of a given area. While census tracts may provide HUD with a general indication of residential patterns, they are inadequate as the sole indicators of the racial or economic composition of housing in a neighborhood." 464 F. Supp. at 839 (PA-23a) (emphasis added)

The courts below have merely held that HUD has a duty to look beyond census data, particularly when it is "clearly outdated" as admitted by HUD in this case, 464 F.Supp. at 840 (PA-26a), and make an "ad hoc" determination as to the identity of the affected community.

The petition quotes the words "ad hoc" more than twenty times in its petition, making many incorrect inference with regard to the District Court's reference thereto. The only use of that term made by the District Court was that HUD may not use a preconceived determination of

what size area may be affected by a given project (whether it be 100 units or 10,000 units) but rather that HUD make an "ad hoc" or individualized determination in each instance. The Court did not as petitioner infers require that the entire evaluation process be administered in such a fashion.

Respondents produced substantial and overwhelming evidence to prove that the relevant area had a heavy concentration of minority and low income families. The great majority of this evidence was already in HUD's files, although not in the file on this project. Both the New York City Housing Authority and the privately owned but federally financed low income housing projects in the area were required to and did file annual reports with HUD which included detailed statistics on racial

composition and income levels for their tenants. Unfortunately, the EO specialist was aware of the existence of these reports but chose not to look at them. The other major sources for respondent's information were the local schools which readily provided the information. To require that HUD make even these minimal attempts at obtaining more pertinent and up to date information in evaluating a proposed site should not be said by even the petitioner to be such an "intolerable burden upon HUD and upon developers" as to "thwart the purposes of the Fair Housing Act of 1968 and the Housing and Community Development Act of 1974." (P-6)

A remand to the agency is not always required, a) Where there is an administrative record, b) the facts have been fully developed on trial, c) the agency and developer had an

opportunity to and did actually submit additional "post hoc" evidence and rationalizations in support of the original determination, d) the administrative agency, as HUD herein, did not choose to request a remand as alternative relief in the District Court and did not prosecute an appeal to the higher Court, and where the agency would have no choice on a remand but to come to the same conclusion as the Court did. In ZUBER v. ALLEN, 396 U.S. 168 (1969) the government also did not press for a remand while the private petitioner, as Tenhill herein, did press for a remand; this Court found that a remand to the agency would be inappropriate, stating:

> "Although the Secretary does not press the point, the private petitioners argue that this Court should at the very least reverse for a trial on the merits or alternatively reverse with instructions to remand to the Secretary for further

consideration.

> This is not a case where a department has acted without a formal record. In such instances a trial might be appropriate to afford the department an opportunity to develope those facts which underpin its action. When action is taken on a record the department cannot then present testimony in court to remedy the gaps in the record any more than arguments of counsel on review can substitute for an agency's failure to make findings or give reasons. A remand to the Secretary is inappropriate in the absence of a request by the Government. Counsel for the Department has advanced no new theory for sustaining the order." Id. at 196

See also American Trucking Assns. v. U.S. 364 U.S. 1, 16 (1959); Citizen Band of Potawotomi Indians v. United States, 391 F.2d 614, 624 (Ct. Cl.), cert. denied 390 U.S. 957 (1968); Arkansas Best Freight System, Inc. v. United States, 364 F.Supp. 1239, 1271 (W.D. Arkansas 1973).

Still, petitioner would have this Court reverse the Court of Appeals and District Court and remand the entire matter back to HUD for further reconsideration. Such a remand would be the death knell for this community. The District Court stated in its decision:

> "the community has voiced vehement objections to the consideration of another low-income housing complex. The residents who testified indicated that many have left or are in the process of leaving the neighborhood. They stated that they would also leave if Tenhill were built. They and their neighbors see this as the last straw that will insure the ghettoization of the area. This attitude is shared by both black and white residents who have decided to abandon the neighborhood because they refuse to live in a ghetto." 464 F. Supp. at 842, 843 (PA-30a)

> "The area's black and white community stands ready to abandon the area if Tenhill is built." Id. at 836 (PA-14a).

The community is at a crossroads; prior to Tenhill the community thought they had seen the last of low-income projects in their neighbor-

hood, they felt the community would have an opportunity to stabilize and revitalize itself. If this case is referred back to HUD, the community may very well abandon the area without waiting for HUD to come down with another determination, even though such determination would virtually have to be in the community's favor. Such a conclusion would come too late to save this community. HUD and Tenhill as stated, submitted both the original record and substantial "post hoc" facts and rationalizations. What more could they offer to the question? Respondents respectfully request this Court to end this matter now and permit this community to survive.

2. The holding of the District Court that the relevant community surrounding the proposed

site was at the tipping point and that petitioner's proposed project would tip that community from a racially integrated area into a ghetto, as affirmed by the Court of Appeals, was clearly correct.

The decision of the District Court more than adequately sets forth the relevant facts supporting its holding on tipping and respondents will not repeat those same facts unnecessarily.

The concept of "tipping," the "linchpin" of the District Court's holding, first enunciated in Otero, was further defined in Trinity Episcopal School Corporation v. Romney, supra:

> "We conclude for the purposes of this litigation that the tipping point of a community is that point at which a set of conditions has been created that will lead to the rapid flight of an existing majority class under circumstances of

> instability which result in the deterioration of the neighborhood environment. The criteria to determine whether an area has reached or is approaching this point are: (1) the gross numbers of minority group families in a measurable economic or social group which are likely to affect adversely area conditions; (2) the quality of community services and facilities; and (3) the attitudes of majority group residents who might be persuaded by their subjective reactions to the first and second criteria to leave the Area. Id. at 1065

As fully set forth in the opinion of the District Court, respondents offered overpowering evidence not only to prove that HUD had acted arbitrarily and capriciously, but also on the substantive issue, that the community was in danger of "tipping" and that the Tenhill project would in fact "tip" the community into a ghetto or at the least, complete and solidify a "pocket ghetto." At no point in its petition has petitioner even alleged, much

less cited any evidence, that the area was not in danger of tipping or that its project would not tip the area.

The timing of petitioner's petition, as well as the tenor of its argument would indicate that the application for a writ of certiorari was made solely as a result of this Court's decision in Strykers Bay Neighborhood Council, Inc. v. Karlen, U.S. ,100 S. Ct. 497 (1980), which summarily reversed the Second Circuit's holding in Karlen v. Harris 590 F. 2d 39 (2d Cir.1978). Petitioner alleges that the District Court "primarily relied" (P-6) upon Karlen, that it was the "linchpin of the decision." (P-7).[18]

Admittedly, the District Court cited the Karlen case a number of times for the following:

18. Hereafter, references such as P-6, etc. refer to the petitioner's petition.

"It is now well settled that HUD has an affirmative duty to promote racial integration through its housing policy." 464 F. Supp at 837 (PA-17a).

"these acts place a heavy burden on HUD to further national housing policy by avoiding the concentration of minority or low-income families in the same community." Id. at 837 (PA-18a)

"site selection (of housing projects) has surfaced as the major vehicle for insuring that the purposes of the Acts are accomplished". Id at 837 (PA-18a)

"Nor, in light of the national housing policies contained in the various housing Acts, could it (HUD)properly limit the scope of its inquiry to any one area (census tract) where that would distort HUD's determination." Id. at 839 (PA-21a)

"In recent years the focus has shifted to housing patterns as the underlying cause of segregation." Id at 839 (PA-22a)

"such concentration (low income housing project in an area containing an already high concentration of low-income housing), regardless of its impact on a 'tipping' analysis, was contrary to HUD's affirmative duty to develope integrated communities through its housing policies." Id. at 843 (PA-33a)

> "Karlen requires HUD to consider communities and the impact of low-income housing on an ad hoc basis. (citing Otero v. New York City Housing Auth.) Id. at 844 (PA-33a)

Respondents however, do not read this Court's decision in Stryker as reversing that substantial line of authorities, some cited previously, which the District Court relied upon. Rather, respondents believe Karlen was reversed on a very narrow point. This Court noted in its opinion that "the District Court expressly concluded that HUD had not acted arbitrarily or capriciously" and that the Court of Appeals "did not overturn that finding," _ U.S. at _, 100 S. Ct at 500. Therefore, having determined that HUD had not acted "arbitrarily or capriciously," the Court of Appeals should not have disturbed HUD's administrative determination. In this case both the District

Court and the Court of Appeals by its affirmance "expressly concluded" that HUD had acted arbitrarily and capriciously, and more importantly, that a "tipping" situation existed. The District Court herein found that not only HUD's procedure, but also its determination was arbitrary and capricious.

The issue of tipping was never considered in Karlen by the District Court, the Court of Appeals or this Court.[19] The issue involved there was rather one which arose under the National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. 4321 et seq. Granted, the District Court in this case also found that NEPA was violated when

19. The tipping question had been considered previously in that case's history, Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044 (S.D.N.Y. 1974), aff'd as to tipping, 523 F.2d 88 (2d Cir. 1975)

HUD had approved the location of Tenhill's low-income housing project in an area with a high concentration of low income housing.[20]

However, the District Court "found numerous other bases for enjoining HUD's action" and did not elaborate on the NEPA challenges.

Petitioner argues that, having followed its regulations (which HUD did not do in this

20. Respondents had also argued that HUD violated NEPA by failing to prepare an Environmental Impact Statement ("EIS") 42 U.S.C. 4332 (2) (c); that HUD's regulation which determined that an EIS was only required for projects with over 500 units were in violation of NEPA in that they ignored the difference between a Manhattan setting and one of very low density and ignored the cumulative harm that results from a series of low-income government financed projects. Hanley v. Kleindienst 471 F.2d 823 (2d Cir. 1972); that even were a formal EIS not required, that HUD failed to even consider possible alternatives, 42 U.S.C. 4332 (2) (D), Trinity Episcopal School Corp. v. Romney, supra; Environmental Defense v. Corps of Engineers, 429 F. 2d 1123 (5th Cir. 1974).

case) HUD was immune from further judicial review. (P-6). Respondents do not read this Court's decision in Strykers Bay Neighborhood Council, Inc. v. Karlen, supra, as standing for that dangerous rule of law. Not only an agency's procedure, but also the agency's determination itself must meet the "arbitrary and capricious" test, otherwise an agency need only pay "lip service" to the procedural rules and then make any determination it may desire, no matter how "arbitrary or capricious" the determination itself might be. Section 706 of the Administrative Procedure Act, 5 U.S.C. 706, requires a "searching and careful" inquiry into the facts and "a finding that the actual choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law." Citizens to Preserve Overton Park v. Volpe 401 U.S. 402, 416 (1971).

Petitioner lastly urges that "the District Court foreclosed consideration by HUD of other relevant factors which would have required the approval of the Terrace Gardens proposal" and refer to the HUD Site and Neighborhood Standards, particularly Section 880.112 (c) (1) (i and ii) (PA-50a). Said regulation permits HUD to approve the location of a low income housing project in an area of minority concentration where "(i) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot

otherwise feasibly be met in that housing market area."

The District Court, in declining to entertain respondents application to set aside subsections (i) and (ii) of 24 C.F.R. 800.112 (c) (1) on the ground that they conflict with the relevant housing acts, stated:

> "The evidence indicates that those exceptions were not met in this case. HUD has submitted no evidence to show that, at present, there are alternate, suitable housing sites on Staten Island for low income housing. Moreover, the evidence clearly indicates that an overriding need for housing of this nature does not exist in this housing market area." 464 F.Supp. at 843 (PA-32a).

Again, it is significant that HUD chose not to even raise the aforesaid exceptions as a basis for evading the congressional mandate in favor of integration either in the administrative stage or in the District Court, nor

did it choose to appeal on that or any other issue.

Perhaps even HUD now realizes that the District Court is correct and that the area is not the proper site for another high-rise low-income housing project and has instead chosen to apply its funding to more suitable sites elsewhere.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: February 27, 1980

Respectfully submitted,

JOHN G. HALL
JOHN S. WELLEKENS
HALL & THOMPSON
57 Beach Street
Staten Island, New York 10304
Attorneys for Respondents

APPENDIX

APPENDIX "A"

(Statutes and Rules Involved)

NATIONAL ENVIRONMENTAL POLICY

Sect. 4321. Congressional declaration of purpose

The purpose of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Sect. 4332 Cooperation of agencies; reports;

availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible

(2) All agencies of the Federal Government shall;

(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.

(iii) alternatives to the proposed action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

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(e) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

Housing and Development Act of 1974

Sect. 5301 Congressional findings and declaration of purpose

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(c) The primary objective of this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. Consistent with this primary objective, the Federal assistance provided in this chapter is for the support of community development activities which are directed toward the following specific objectives -

****

(6) the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of

neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income.

Fair Housing Act of 1968

Sect. 3601 Declaration of Policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

Sect. 3608 Administration

****

(d) The Secretary of Housing and Urban Development shall -

(5) administer the programs and activities

relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.